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Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

No. 15-1262

In the
Supreme Court of the United States

PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., in his capacity as Chairman of the North Carolina State Board of Elections,

Appellants,

v.

DAVID HARRIS AND CHRISTINE BOWSER,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

REPLY BRIEF FOR APPELLANTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

Appellees' brief relies on distortions of the record and largely ignores the difficult challenges and competing obligations facing state legislators undertaking the divisive decennial task of redrawing congressional districts. As to CD12 in particular, Appellees also ignore that *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234 (2001), reversed a prior three-judge panel's finding of racial predominance by rejecting the same methodologies and evidence Appellees have recycled, and instead reached the unremarkable conclusion that a Democratic-controlled legislature drew CD12 to favor Democrats. That conclusion does not lose its force, nor are evidentiary deficiencies somehow cured, just because the political shoe is on the other foot.

While Appellees repeatedly emphasize the need for this Court to review the three-judge federal court's conclusions deferentially, they conveniently downplay the fact that an earlier three-judge state court reached the opposite conclusions. This Court cannot defer to both sets of findings as not clearly erroneous, and at a minimum must reject Appellees' federalism-defying suggestion to ignore the earlier state-court findings altogether based on the happenstance that this Court reviewed the later-filed federal-court case first. But the problem for Appellees runs far deeper. Those earlier state-court findings should have had *res judicata* effect in this later-filed federal action. Appellees' principal response is to suggest that Appellants waived this defense, but they in fact raised it at every stage.

As to CD12, Appellees manufacture a new theory that CD12 was drawn in a misguided effort to comply with a decades-old DOJ preclearance objection. That argument does not survive a reading of the next (conveniently omitted) sentences of the very document on which this newly minted and erroneous claim is premised. In reality, as the state courts correctly concluded, CD12 was based principally on political motivations—just as it was when this Court rejected a nearly identical constitutional attack on the same district in *Cromartie II*. As in *Cromartie II*, a politically motivated effort to concentrate Democratic voters in CD12 inevitably increased its BVAP given the political reality on the ground. That byproduct of politically motivated redistricting hardly triggers strict scrutiny, and the parallels with *Cromartie II* make Appellees' failure to provide an alternative map and reliance on the methodologies rejected in *Cromartie II* both inexplicable and fatal.

As to CD1, Appellees make the bold claim that the legislature conducted *no* analysis of whether drawing a majority-minority district was necessary to comply with the Voting Rights Act (VRA). In reality, the legislature gathered a wealth of evidence confirming that the VRA required CD1 to be drawn as a majority-minority district. And even then, the legislature did not blindly pursue that goal at the expense of traditional districting principles. Tellingly, Appellees do not deny that Section 2 required the legislature to consider race in CD1 to avoid VRA liability. Their only quarrel is with the legislature's decision to target a BVAP of 50%-plus-one instead of 47%. Appellees thus do not want to eradicate the use of racial targets in redistricting, let

alone free up the Republican-controlled legislature to redistrict unconstrained by the need to consider race to comply with the VRA. They just want to force the legislature to use their targets. But nothing in the Constitution or the VRA requires legislatures to draw precisely the districts minority voters (or political parties) prefer, especially when everyone, including the government, acknowledges that state legislatures need leeway.

I. The First-Filed State-Court Litigation Rejecting The Very Same Claims Raised Here Should Have Barred This Case.

Appellees do not deny that the North Carolina courts considered and rejected the same claims pressed here—and did so on a nearly identical record—before Appellees brought this case. That final judgment from a co-equal state court, brought by organizations that premised their standing on the interests of members such as Appellees, should have ended this follow-on suit. At a bare minimum, it should have shaped the federal court's reconsideration of the same issues and is a complete answer to Appellees' refrain that this Court must defer to the findings below.

Appellees claim that Appellants "abandoned their collateral estoppel argument" after the district court denied summary judgment. Harris.Br.51. Appellants did no such thing. Their proposed findings of fact and conclusions of law filed at the close of evidence expressly argued that "[t]he claims of both plaintiffs are barred by the doctrines of *res judicata* and collateral estoppel because the same claims and issues have already been litigated and

decided by the three-judge panel in *Dickson*." Dkt.138 at 104. And that filing made the same argument pressed here: that Appellees are bound by *Dickson* because they are members of the North Carolina NAACP, which premised its standing in *Dickson* on alleged harms to its members. *Id.* at 56-60, 104-07.

Appellees deny membership, but their testimony tells a different story. Mr. Harris confirmed that he is currently "a member of the NAACP" and had been one "for several years." JA61. Although he was uncertain whether he was a member of the national or the statewide NAACP, the president of the state branch explained that the two memberships are the same. JA78-84. Ms. Bowser testified that she has been a member of the Mecklenburg County NAACP "on and off since the 1960s" and has paid dues to both that branch and the national organization. JA46-49. She further confirmed that she was a member of Democracy North Carolina—another *Dickson* plaintiff—both when *Dickson* was filed and when this lawsuit was filed. JA50-51. There is thus no doubt that both plaintiffs were members of organizations that fully, adequately, and unsuccessfully litigated these claims on their behalf in state court.

That readily distinguishes this case from *Taylor v. Sturgell*, 553 U.S. 880 (2008). *Taylor* did not involve an association that litigated on behalf of its members; it involved an effort to deem the relationship between two *individuals* "close enough" to treat one as having represented the other. *Id.* at 898. That is a far cry from having an association

litigate on its members' behalf, and then allowing those same members to relitigate the same issues individually after the association's suit fails. Indeed, *Taylor* specifically distinguished the "virtual representation" theory it was rejecting from suits where one party actually litigated on behalf of another. *See id.* at 895.

Even if the state litigation does not foreclose this case entirely, it should at least inform this Court's consideration. Appellees concede that the state and federal courts examined the same evidence and applied the same law yet reached conflicting conclusions.[1] Both the state and federal court decisions are now before this Court. In that unique situation, affirming both decisions as not clearly erroneous is not an option.[2] And certainly which decision gets greater deference should not turn on the happenstance of which case arrived here first.

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[1] Appellees note that the state trial court found racial predominance as to CD1, but the state supreme court reversed that finding because it was based on the erroneous premise that the mere decision to draw a majority-minority district proves predominance. *Dickson v. Rucho*, 781 S.E.2d 404, 425 (N.C. 2015). The court saw no need to remand, however, because CD1 would satisfy strict scrutiny even if it applied, *id.* at 427-30—a course of action equally open to this Court.

[2] The government, which rests its brief almost entirely on the clear error standard of review, makes no mention of *Dickson*, federalism, comity, or the fatal estoppel problem *Dickson* creates for Appellees. In light of the government's concession (at 25) that the evidence concerning CD12 could have properly supported a conclusion that politics, not race, predominated, its failure to address the fact that the state courts in *Dickson* reached just that conclusion is inexplicable.

At an absolute minimum, the contrary and first-in-time state-court findings should be a death knell for Appellees' repeated suggestion that this Court should simply defer to the decision below. This Court has not been particularly deferential to lower court determinations concerning congressional redistricting in North Carolina, reversing in the four previous cases to reach this Court. The prior state-court findings provide a particularly strong reason for searching review here. For example, four of the six trial judges found that race did *not* predominate as to CD12. "Deferring" to a minority of two makes no sense whatsoever. Indeed, basic principles of federalism suggest that if any findings are due deference, it is the first-in-time state-court findings.

II. Congressional District 12 Is Not An Impermissible Racial Gerrymander.

A. Appellees' "Direct" Evidence Does Not Demonstrate Racial Predominance.

Appellees failed to satisfy the demanding burden necessary to prove racial predominance as to CD12. In fact, the political motivations animating CD12 this time around followed directly from, and were even more obvious than, those that this Court held precluded a racial-predominance finding in *Cromartie II*. After Republicans gained control of both houses of the state legislature for the first time in a century, they unsurprisingly used their newfound power to improve their electoral prospects. Rather than completely rewrite the electoral map and eliminate the Democratic-favoring version of CD12 that the Democratic-controlled legislature drew and this Court reviewed in *Cromartie II*,

Republicans doubled down on the Democrats' version by *increasing* the percentage of Democratic voters in CD12 to the benefit of Republican candidates in surrounding districts. Indeed, the principal architect of the map looked *only* at 2008 election results, not race, while drawing CD12. The legislature's political motivations could not be plainer.

Appellees tell a very different story, claiming that the legislature intentionally "drew CD12 as a majority-minority district to comport with an antiquated DOJ objection premised on the 'max-black' policy." Harris.Br.22. Indeed, they even claim that North Carolina "expressly stated" in its preclearance submission that "[t]he 1992 DOJ objection drove" the legislature to draw "CD12 as a majority-minority district." *Id.* Appellees point to no lower court findings to support this bizarre theory because, *inter alia*, they have never advanced it before. And with good reason, as the State's preclearance submission says exactly the opposite. To be sure, the excerpt plucked by Appellees begins by observing that "[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the State to create a second majority-minority district combining the African-American community in Mecklenburg County with African-American and Native American voters residing in south central and southeastern North Carolina." JA478. But the very next sentences—conveniently omitted by Appellees—say that the Chairmen *rejected* that idea.

As the submission explains, the Chairmen asked Congressman Watt for his opinion, and he indicated that he "would oppose any redrawing of the Twelfth District ... as originally contemplated by the 1992 Justice Department objection" because the communities DOJ identified "were not politically cohesive." JA478. The Chairmen accordingly scrapped the idea and instead "enacted a version of District 12 that is similar to the 2001 version." JA478-79. A quick glance at the 2011 map confirms as much: CD12 remains in the same six counties as the benchmark plan and goes nowhere near south central or southeastern North Carolina. JA1160.

Appellees (and the government) alternatively attempt to rest their case on the legislature's decision to move into CD12 a handful of heavily African-American precincts in Guilford County, the lone covered jurisdiction in CD12. Harris.Br.26-27. In their view, Dr. Hofeller somehow conceded that this move was motivated by race. Harris.Br.26. If true, that would show, at most, only that *a single decision* in drawing CD12 was racially motivated, and would leave unrebutted his testimony that race played no role in drawing the district's other boundaries. That is a considerable problem because Appellees mount an equal protection challenge to the drawing of CD12 as a majority-minority district, not a challenge to the treatment of Guilford County. But, in fact, what Dr. Hofeller actually said was that those precincts were moved to CD12 because the legislature wanted to "reunify the African-American community in Guilford County," JA1103, not because the legislature wanted to "ratchet[] up" CD12's BVAP, Harris.Br.18. Considering race to that extent

is unproblematic. Reuniting a previously split community of interest is a hallmark of traditional redistricting, and it does not become constitutionally suspect just because the community is an African-American one.

In all events, the underlying justification for the move was political. In the benchmark plan, Guilford County was split among CD6, CD12, and CD13, and Greensboro, the heart of the county's African-American community, was split between CD12 and CD13, both of which were strong Democratic districts. JA1140, 1159. In 2011, the Chairmen "completely revamp[ed] District 13, converting it into a competitive GOP district" by moving it halfway across the State. JA1139, 1160. Most of the precincts CD13 left behind were moved into CD6, but because CD6 "was intended to be a GOP-leaning district," JA1146, the Democratic-leaning precincts had to go elsewhere. Solving that problem was easy for the Greensboro precincts in Guilford County: They had been in CD12 before the State was awarded a 13th district, so Dr. Hofeller moved them back. JA1146, 1173. As he explained, that not only served the legislature's political objective of "remov[ing] strong Democratic [precincts] from New District 6," JA1104, but also comported with sound districting principles.

Appellees fixate on a line from the Chairmen's statement accompanying the release of the 2011 plan that, "[b]ecause of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population

found in the current Twelfth District." JA358. But their selective quotation comes only *after* the Chairmen explained that they followed Congressman Watt's advice "to model the new Twelfth District after the current Twelfth District," and that CD12 "was created with the intention of making it a very strong Democratic District." JA357-58. Accordingly, at most, it shows only that race was one of multiple factors the legislature considered, not that it predominated.

Moreover, the statement Appellees identify does not even further their legal theory, which focuses on the elevation of CD12's BVAP "to just over 50%." Harris.Br.18. Instead, the statement simply acknowledges that the BVAP did not fall *below the benchmark plan level*, which is neither a surprising nor a sinister comment when it comes to a covered jurisdiction subject to preclearance and non-retrogression requirements. Certainly the recognition that the racial composition of a district relative to its benchmark may be relevant for Section 5 purposes is not enough to trigger strict scrutiny. Indeed, to the extent the reunification of the African-American community in Guilford County was motivated by a desire either to reunify a community of interest or to avoid retrogression, it affirmatively undermines Appellees' theory that the legislature pursued a majority-minority district for its own sake. Furthermore, Appellees conspicuously decline to argue that the State could have allowed CD12's BVAP to drop below the benchmark level without violating Section 5—just as they conspicuously decline to argue that the State could have placed half of Greensboro's African-American community in the

heavily Republican CD6 without violating Section 5. That is not their challenge, and if it were, the need for Section 5 compliance would satisfy strict scrutiny in any event.

Finally, Appellees continue to rely (at 18) on a comment Senator Rucho allegedly made about leadership wanting to "ramp the minority percentage ... up to over 50 percent." But even assuming that disputed comment was made, it had no impact on how the district's lines were drawn, as Dr. Hofeller did not "receive any instructions about the racial percentage to include in the 12th District." JA2686. Appellees' only response is to note the undisputed fact that the Chairmen later "unveiled a plan wherein CD12 was drawn at just over 50%." Harris.Br.19. But given the political and racial composition of the area surrounding CD12, that is an unremarkable byproduct of the legislature's effort to make the district more Democratic. Thus, Appellees' *post-hoc-ergo-propter-hoc* argument just begs the question whether CD12's BVAP was the product of politics or race. None of Appellees' purportedly "direct" evidence comes close to proving it was the latter.

B. Appellees' "Circumstantial" Evidence of Racial Predominance Is No Stronger.

Appellees get no further with their "circumstantial" evidence. At the outset, Appellees concededly never supplied the one piece of circumstantial evidence that this Court has deemed essential in a situation like this: an alternative map demonstrating that "the legislature could have achieved its legitimate political objectives in

alternative ways that ... would have brought about significantly greater racial balance." *Cromartie II*, 532 U.S. at 258. While Appellees characterize the State as a slow learner, it is Appellees who have failed to heed the "teaching" of the "latest chapter[] of the Court's racial gerrymandering jurisprudence." Harris.Br.1. Appellees seem to forget that the State won the latest chapter, and their failure to provide the alternative map required by *Cromartie II* in challenging *the same district* is inexplicable—or perhaps explained only by the reality that such a map cannot be drawn.

Appellees attempt to wriggle out of the alternative-map requirement by claiming that "[t]he plaintiffs in *Cromartie* could initially muster 'only circumstantial evidence.'" Harris.Br.32. But even assuming that were correct (and it is not), Appellees never explain why that would make any difference, especially where there is direct evidence that the map-drawer consulted only political data. Nothing in *Cromartie II* turned on the distinction between direct and circumstantial evidence, and this Court did not mention either type of evidence when setting out the alternative-map requirement. Instead, the only factors the Court identified were whether "majority-minority districts ... are at issue" and whether "racial identification correlates highly with political affiliation." 532 U.S. at 258. Appellees do not and cannot deny that both factors are present here.

Moreover, Appellees' premise that *Cromartie II*'s statement was prompted by the plaintiffs' reliance exclusively on circumstantial evidence is incorrect. As Appellees implicitly concede with their caveat

"initially," the *Cromartie* plaintiffs took additional discovery after the *Cromartie I* remand and uncovered "two pieces of 'direct' evidence." *Id.* at 253. One was very similar to the "direct" evidence on which Appellees rely: an e-mail reporting that the map-drawer had "moved [the] Greensboro Black community into the 12th [district]." *Id.* at 254. Thus, by the time this Court faulted the plaintiffs for failing to provide an alternative map in *Cromartie II*, they had mustered direct and circumstantial evidence. This Court nonetheless held a racial-predominance finding clearly erroneous in the absence of a map showing that political objectives could be accomplished in a more race-neutral way.

Appellees also attempt to recast the alternative-map requirement as a fallback option for racial gerrymandering plaintiffs with no other evidence. Harris.Br.32-33. That is exactly backwards. *Cromartie II* identified the plaintiffs' failure to supply an alternative map as a ground for *rejecting* their claims. 532 U.S. at 258.[3] And if ever there were a case to abide by that rule, it is this one, which involves the same district and where politics and race are so intertwined that two courts reached conflicting

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[3] The government argues that requiring an alternative map "would be inconsistent with [*Bush v. Vera*, 517 U.S. 952 (1996)]," US.Br.32, but *Vera* predated *Cromartie II* by five years. That *Vera* did not impose an alternative-map requirement that did not yet exist is hardly telling. Beyond that time-bending contention, the government offers no reason to reject an alternative-map requirement. And the requirement is entirely consistent with the government's recognition that legislatures need leeway and that courts should not lightly find that race predominated.

conclusions about which one predominated on nearly identical records.

Appellees fare no better with the circumstantial evidence they *did* provide. They first claim that CD12's "tortured shape" is evidence of racial predominance. Harris.Br.22. But this Court has already found that CD12's "snakelike shape" was driven by politics rather than race. *Cromartie II*, 532 U.S. at 240. Moreover, the Republican-controlled legislature's decision to use CD12 and its snakelike shape as a basis for the new CD12 was itself political. That CD12 still has the same shape thus is hardly proof of racial predominance. The same goes for Appellees' evidence that in "five out of six counties, the BVAP in the portion of the county in CD12 is ... greater than the BVAP in the portion of the county in the neighboring district." Harris.Br.25. The same thing was true in *Cromartie*, *see Hunt v. Cromartie*, 526 U.S. 541, 548 & n.4 (1999), yet this Court found it of no probative value because "racial identification is highly correlated with political affiliation in North Carolina," *Cromartie II*, 532 U.S. at 243.[4]

Appellees are likewise unable to resuscitate their expert testimony. As for Dr. Peterson, Appellees claim that this Court should credit his testimony because it credited the "same analysis" in *Cromartie*. Harris.Br.28. In fact, Dr. Peterson's boundary segment analysis was the one aspect of his testimony that the Court did *not* credit. *Cromartie II*, 532 U.S.

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[4] Appellees' claim that "the General Assembly here reconstructed the *Shaw* district," Harris.Br.33, is rhetoric, not reality. The version of CD12 struck down in *Shaw II* was nearly twice as long and crossed nearly twice as many counties.

at 252. Moreover, his flawed analysis in *Cromartie* at least indicated that the district "included the more heavily Democratic precinct much more often than the more heavily black precinct." *Cromartie I*, 526 U.S. at 550. Here, *half* of his analysis was inconsistent with his hypothesis. NC.Br.40.

As for Dr. Ansolabehere, Appellees concede that he used only voter registration data notwithstanding this Court's admonishment that "registration figures do not accurately predict preference at the polls" in North Carolina. *Cromartie II*, 532 U.S. at 245. Appellees try to salvage his conclusions by citing his testimony that registration data were a "better indicator of voting behavior than the *black voting-age population* was." JA2535 (emphasis added). But he was not limited to those two options. He concededly had access to data on *actual voting behavior*, JA2562, yet he inexplicably used a *proxy* for that data instead of the data themselves. Even if Dr. Ansolabehere is correct that, contrary to the Court's conclusion in *Cromartie II*, voter registration is a "pretty good indicator of voting behavior," JA2535, he had no reason to use a proxy, no matter how good, when the information being approximated was readily available—unless, of course, actual voting data would have undermined his preferred conclusions.

In the end, then, Appellees' case as to CD12 boils down to a baseless accusation that the legislature was laboring under the misimpression that it was bound by "DOJ guidance from more than two decades ago," Harris.Br.5, a fixation on a handful of precincts in a single county, and the mere fact that CD12 still has the same unusual shape it had in *Cromartie II*.

As the state courts correctly recognized when they confronted the same record, that is manifestly insufficient to satisfy Appellees' "demanding" burden of proving that "race *rather than* politics *predominantly* explains District 12's ... boundaries." *Cromartie II*, 532 U.S. at 243.

III. Congressional District 1 Is Not An Impermissible Racial Gerrymander.

A. Appellees Failed to Meet Their Demanding Burden of Proving Racial Predominance.

Much like the district court, Appellees focus their racial predominance arguments as to CD1 on the bare (and undisputed) fact that the legislature intentionally drew CD1 as a majority-minority district. But the "legislature's adoption and prioritization of a racial target is not sufficient to establish racial predominance." US.Br.12. Instead, Appellees must prove that the legislature abandoned traditional principles in service of that target. *See Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1271-72 (2015). Although Appellees now point to evidence that they believe would have satisfied their burden, the district court discussed none of it, instead focusing exclusively on the legislature's mere use of a BVAP target and a few superficial oddities in CD1's shape.

At any rate, Appellees' efforts to supplement the court's inadequate analysis are unavailing, as they ignore the single most important problem the legislature confronted in drawing CD1: The benchmark district was underpopulated by nearly *100,000 people*, and the population of the rural

regions that comprised it was continuing to decline. It is little surprise, then, that the legislature could not maintain CD1 as a "distinctively rural" district. Harris.Br.4. Doing so would only have exacerbated the population deficit problem. The legislature could have tried to solve that problem by relocating the district entirely or stretching it into distant areas of the State. Instead, it extended the district westward into populous Durham County. That served several race-neutral objectives: "There is historical precedent for a district that combines Durham with counties located in eastern North Carolina," JA365, 2426; "Durham County is contiguous to one of the counties found in the 2001 version of District 1," JA475; and the rapid population growth in Durham County is likely to offset any continued population decline in CD1's rural counties, JA112-13, 354, 1097-98.

To be sure, the move also enabled the legislature to keep CD1 a majority-minority district, which prevented retrogression in the covered counties and the vote dilution that could result from transforming CD1 into a majority-white district. But that alone does not demonstrate that "the legislature predominately use[d] race as opposed to other, 'traditional' factors" when "determining *which* persons [to] place[]" in CD1. *ALBC*, 135 S. Ct. at 1271. Moreover, once again, Appellees identify no alternative design that would have "would have brought about significantly greater racial balance" while still achieving the legislature's race-neutral objectives, including constitutionally mandated population equality. *Cromartie II*, 532 U.S. at 258. Accordingly, Appellees failed to meet their

demanding burden of proving racial predominance as to either of the challenged districts.

B. The Legislature Had a Strong Basis in Evidence to Draw CD1 as a Majority-Minority District.

Even if Appellees had proven racial predominance, CD1 would still pass constitutional muster because the State demonstrated the requisite strong basis in evidence for its belief that its consideration of race was necessary to achieve VRA compliance. The legislature had drawn CD1 as an ability-to-elect district for decades, and its BVAP already approached 50%. And nothing that happened since the previous round of redistricting had eradicated racially polarized voting from the region. Indeed, Appellees studiously avoid claiming that racially polarized voting no longer exists in CD1. Instead, they try to dodge the issue, claiming that "the State admitted it did not analyze the third *Gingles* factor." Harris.Br.38. Appellees provide no citation for that astounding accusation—because no such concession exists. In reality, the legislature expended considerable resources studying whether racially polarized voting in and around CD1 posed a risk of majority bloc voting defeating minority-preferred candidates. *See* NC.Br.52-55.

Appellees attempt to dismiss that evidence because it focused on the counties that comprise CD1 rather than CD1 itself. Harris.Br.39-42. But Appellees nowhere explain why evidence of racially polarized voting is any less probative when studied at the county rather than the district level, or why consideration of county-level data is not wholly

appropriate *before* the district is redrawn. Appellees' effort to minimize the CD1-focused evidence is similarly unavailing. They claim that "Dr. Block's report contains only one data point specific to CD1," Harris.Br.39, but he in fact studied election results in the vast majority of the state legislative districts located within CD1. JA894-96. They disparage Dr. Brunell's report as insufficiently focused on CD1, but Dr. Brunell studied federal, state, and local elections results in *every single county* in CD1, and found "statistically significant racially polarized voting" in *all of them*. JA973. And Appellees claim that the public testimony mentioned CD1 "only once," Harris.Br.41, but in fact numerous witnesses from counties in CD1 testified about polarized voting and minority candidates' lack of electoral success. JA2066-71.

Appellees criticize the legislature for according insufficient weight to the results of past elections in the prior version of CD1, but an excessive focus on past congressional election results in CD1 risks mistaking the advantages of incumbency for an enduring ability to elect. It also ignores the question at hand. Election results in an existing district can be critical in an *affirmative* Section 2 case, where a plaintiff seeks to prove an *actual* violation in that *existing* district. But the inquiry is fundamentally different when a State is defending against a racial gerrymandering claim on the ground that it feared *future* Section 2 liability in a *hypothetical* district drawn without consideration of race. In that context, focusing myopically on past elections in pre-existing versions of the district would be misguided.

This is a case in point. The benchmark version of CD1 was underpopulated *by 97,500 people*, meaning at least 13% of voters in the new CD1 would be voting there for the first time. JA2690. The legislature could not blithely assume that all 97,500 of those voters would mimic the voting trends of CD1's previous residents. Voters do not change their habits based on the number of their congressional district. Instead, the legislature had to confront whether the necessary adjustments to CD1 could cause dilution. And for those purposes, voting patterns in areas outside pre-existing CD1 are what matters. Those patterns made clear that blindly adding new precincts to CD1 from surrounding white and Republican areas could have dramatically shifted the district's racial and partisan makeup and jeopardized its compliance with Section 2. NC.Br.57-58. Indeed, the incumbent in CD1 had won his most recent election by only 33,000 votes—far fewer than the number of new voters needed to restore population equality. JA378.

Rather than meaningfully confront this reality, Appellees ignore it; indeed, they never even mention the massive underpopulation problem the legislature was constitutionally compelled to address. The government, for its part, accepts the problem but proposes a convoluted solution: In its view, the legislature should have created a dummy map that did not take race into account, "analyze[d] the past behavior of voters added to the district," and then, if but only if the "bloc-voting rates by those new voters required augmentation of CD 1's BVAP," it could draw a new map that considered race. US.Br.24-25 & n.11. That proposal has little to recommend it.

The government does not suggest that this elaborate process would have obviated the need for the legislature to consider race when redrawing CD1; the government imposes its alternative-mapping requirement only on state legislatures discharging a necessary sovereign function, but not on litigants alleging a constitutional violation; and the government's proposal evinces a version of narrow tailoring that eliminates any leeway for States seeking to navigate the already narrow channel between the VRA and the Equal Protection Clause. This Court's precedents require a reasonable basis to fear VRA liability, not the specific methodology or mathematical exactitude that the government's convoluted proposal suggests.

In all events, the back-and-forth about racially polarized voting is largely beside the point. Notwithstanding their (unfounded) evidentiary quibbles, Appellees never deny that racially polarized voting exists in CD1. Nor do they suggest that the legislature was free to ignore race altogether when drawing CD1 and pursue partisan advantage while paying no mind to whether minority voters retained the ability to elect their preferred candidates. To the contrary, Appellees were perfectly content with the race-based districting that created the benchmark version of CD1. JA2871 (prior versions with "46, 47 percent [BVAP] were terrific examples of an application of the [VRA].").

Appellees thus are neither suggesting that racially polarized voting in CD1 is a thing of the past nor taking a principled stand against racial targets in redistricting; they just want to force the

legislature to use their preferred target. They want a 47% BVAP, not 52%. *See, e.g.*, Tr.709 (Appellees would have been "absolutely fine" with a 46% or 47% BVAP target). And in their view, the legislature cannot raise a VRA-compliance defense *at all* unless it can prove not just that it faced a serious risk of Section 2 liability if it failed to draw an ability-to-elect district, but that the BVAP target it selected reflects *exactly* the racial composition necessary to ensure victory for the minority group's candidate of choice—no more and no less. Indeed, given the strong correlation between race and politics, Appellees come perilously close to arguing (though never expressly) that the Equal Protection Clause and the VRA together compel racial gerrymanders that favor Democrats more or less to the percentage point.

There are any number of problems with Appellants' submission, not the least of which is it is flatly inconsistent with this Court's admonishment that the VRA does not require States to "determine *precisely* what percent minority population" would enable minority voters to elect their candidates of choice. *ALBC*, 135 S. Ct. at 1273. The State needs only "good reasons" to make "the (race-based) choice that it" made. *Id.* at 1274. Appellees cannot seriously argue that the legislature lacked "a 'strong basis in evidence' for concluding that" drawing CD1 as "a majority-minority district [wa]s reasonably necessary to comply with §2," *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) (citation omitted) when even they concede that CD1 needed a BVAP of at least 46% to ensure VRA compliance. Any other conclusion would put States in the impossible

position of being condemned for "unconstitutional racial gerrymandering should [they] place a few too many minority voters in a district," but condemned under the VRA should they "place a few too few." *ALBC*, 135 S. Ct. at 1274.

Appellees' position also flatly contradicts *Strickland*'s holding that "§2 does not mandate creating or preserving crossover districts." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality opinion). While States are free to do so, once it is conceded (as it implicitly is here) that Section 2 requires an ability-to-elect district, the only remedy Section 2 *requires* is a majority-minority district. Appellants and the government attempt to dismiss *Strickland* as "concern[ing] only the first *Gingles* precondition," US.Br.22, but that cramped reading obscures *Strickland*'s reasoning. While the question in *Strickland* was whether a Section 2 remedy is available to a minority group that does not satisfy the first *Gingles* factor, the Court's answer turned squarely on its implications for the other two *Gingles* factors.

Indeed, the whole reason the Court refused to interpret Section 2 as compelling the creation of crossover districts is because doing so would require legislatures (and courts) to try to obtain "elusive" answers to questions as "speculative" as which majority voters are likely to support a minority group's candidate of choice, what is the impact of incumbency, and countless others that "even experienced polling analysts and political experts could not assess with certainty." 556 U.S. at 12. Worse still, that would only increase the prevalence

of "racial classifications and race-based predictions," which is exactly what the VRA and the Equal Protection Clause are supposed to discourage. *Id.* at 18.

None of those concerns falls by the wayside just because the first *Gingles* factor is satisfied. If anything, it is even more problematic to insist that a State divvy up a "politically cohesive" minority group that is "sufficiently large and geographically compact to constitute a majority in a single-member district," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), just because the group may not need the votes of every single one of its members to achieve its political objectives. After all, *Shaw* claims are supposed to *prevent* race from overriding traditional districting criteria such as keeping together "political subdivisions or communities defined by actual shared interests." *ALBC*, 135 S. Ct. at 1270.

At bottom, the question is not whether the legislature should have considered race; it is only how it should have done so. In Appellees' view, the legislature was not even entitled to a cushion of a few percentage points when trying to avoid what everyone admits was a looming Section 2 claim. That ignores this Court's precedents, the realities of the districting process, and the considerable leeway to which States are entitled in trying to comply with federal law. Simply put, States must have *some* way to draw districts without getting caught "between the competing hazards of liability" under the VRA and the Equal Protection Clause. *Vera*, 517 U.S. at 977.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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November 14, 2016